

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

IN THE MATTER OF: M.D. :
: Hon. W. Scott Gwin, P.J.
: Hon. William B. Hoffman, J.
: Hon. John W. Wise, J.
:
:
: Case No. 10-CAF-02-0015
:
:
: OPINION

CHARACTER OF PROCEEDING: Civil appeal from the Delaware County
Court of Common Pleas, Juvenile Division,
Case No. 08071832

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: May 27, 2010

APPEARANCES:

For -Appellee For –Appellant-Mother

KATHRYN MUNGER
Delaware County Prosecutor's Office
140 N. Sandusky Street
Delaware, OH 43015

JULI D. SIEGRIST
2211 US Highway 23 North
Delaware, OH 43015

Gwin, P.J.

{¶1} Appellant Stephanie Pearson appeals a judgment of the Court of Common Pleas, Juvenile Division, of Delaware County, Ohio, which terminated her parental rights in her minor daughter M.D., and granted permanent custody to the Delaware County Department of Job and Family Services. Appellant assigns two errors to the trial court:

{¶2} “I. THE TRIAL COURT’S FINDING THAT M.D. CANNOT BE PLACED WITH MOTHER AT THIS TIME OR WITHIN A REASONABLE PERIOD OF TIME IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶3} “II. THE TRIAL COURT’S FINDING THAT IT IS IN M.D.’S BEST INTEREST THAT PERMANENT CUSTODY BE GRANTED TO THE DELAWARE COUNTY DEPARTMENT OF JOB AND FAMILY SERVICES IS AGAINST THE MANIFEST WEIGHT AND SUFFICIENCY OF THE EVIDENCE.”

{¶4} The record indicates M.D. was born on July 21, 2008. At the time of M.D.’s birth, appellant was incarcerated and not permitted to keep her at the facility. Two days after her birth, Job and Family Services filed a complaint alleging dependency, and took temporary custody of the child on July 23, 2008. She has never been in either parent’s custody.

{¶5} Appellant has been in several community-based correctional facilities and several residential drug treatment facilities, and at the time of the hearing on the motion for permanent custody she was in a residential drug treatment facility. She had not completed all of her case plan goals; specifically, had not attended drug treatment and domestic violence classes and had violated the terms of her parole. The court also found appellant had not maintained stable housing or stable employment.

{¶6} The trial court conducted hearings on the motion for permanent custody on December 7, 2009, and December 17, 2009. The court found M.D. has been in the temporary custody of Job and Family Services from July 23, 2008 through the time of the hearing, more than twelve months out of twenty-two consecutive months.

{¶7} The trial court also found appellant was unable to provide an adequate permanent home for her daughter within one year, and had continuously and repeatedly failed to demonstrate consistent compliance with her substance abuse recovery plan. The court found appellant had been given numerous opportunities to utilize recovery services and resources offered by JFS, but she continually returns to her former life.

{¶8} The trial court found that M.D. had been abandoned by her father and could not be placed in his care within one year. M.D.'s father is not a party to this appeal.

{¶9} A trial court's decision to grant permanent custody of a child must be supported by clear and convincing evidence, which the Ohio Supreme Court has defined as "the measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to allegations sought to be established. It is intermediate, being more than a mere preponderance, but not to the extent of such certainty, as required beyond a reasonable doubt, as in criminal cases." *Cross v. Ledford* (1954), 161 Ohio St. 469, 120 N.E. 2d 118; *In Re: Adoption of Holcomb* (1985), 18 Ohio St. 3d 361, 481 N.E. 2d 613.

{¶10} In determining whether a trial court has based its decision upon clear and convincing evidence, this court must examine the record to determine whether the trier of fact has sufficient evidence before it to satisfy the requisite degree of proof. *State v.*

Schiebel (1990), 55 Ohio St. 3d 71, 564 N.E. 2d 54. If a trial court's judgment is supported by competent and credible evidence going to all the essential elements of the case, then this court may not reverse a trial court's judgment. *C.E. Morris Company v. Foley Construction Company* (1978), 54 Ohio St. 2d 279, 376 N.E. 2d 578. We may not substitute our judgment for that of the trial court if there is competent and credible evidence supporting the findings of fact and conclusions of law. *Schiebel*, supra.

{¶11} We must defer to the findings of the trial court regarding the credibility of witnesses and wait to be given the evidence, because a trial judge is best able to view the witnesses and observe their demeanor, gestures, and voice inflections, and to use their observations in weighing the credibility of the evidence before it. *Seasons Coal Company v. Cleveland* (1984), 10 Ohio St. 3d 77, 461 N.E. 2d 1273. Deferring to the trial court on matters of credibility is crucial in a child custody action, where the trier of fact is able to observe much in the parties' demeanor and attitude that would not translate well to the record. *Davis v. Flickinger* (1997), 77 Ohio St. 3d 415, 674 N.E. 2d 1159.

I.

{¶12} In her first assignment of error, appellant argues the trial court's finding that M.D. cannot be placed with appellant at this time or within a reasonable period of time is against the manifest weight and sufficiency of the evidence.

{¶13} Pursuant to R.C. 2151.414(B) a trial court may grant permanent custody of a child to the movant if the court determines that it is in the best interest of the child and that any of the following apply: The child cannot be placed with either parent within a reasonable time or should not be placed with either parent; the child is abandoned;

the child is orphaned; or the child has been in the temporary custody of the agency for twelve or more months of a consecutive twenty-two month period. *In Re: Schaefer*, 111 Ohio St. 3d 498, 2006-Ohio-5513, 857 N.E. 2d 532.

{¶14} The factors are in the disjunctive, so if the trial court finds any one of the factors apply, it can terminate the parental rights of the parent. A juvenile court is not required to find a child cannot or should not be placed with a parent within a reasonable time if it finds the child has been in the temporary custody of the agency for at least twelve months of a consecutive twenty-two month period. If it finds the child has been in the custody of the agency for at least twelve months out of a consecutive twenty-two month period, it is unnecessary for the trial court to evaluate the other factors. See *In Re: L.D.*, Clinton App. No. CA2004-03-007, 2004-Ohio-4000.

{¶15} The trial court found the child has been in the temporary custody of the agency for more than twelve months out of a consecutive twenty-two month period, and appellant does not dispute this finding. Thus, the court's finding M.D. cannot be placed with appellant at this time or within a reasonable time is unnecessary to the analysis under R.C.2151.414 (B) of whether to grant permanent custody to Job and Family Services, although it is a factor in determining the best interest of the child, see II *infra*.

{¶16} The first assignment of error is overruled.

II

{¶17} In her second assignment of error, appellant argues the trial court erred in finding it was in the best interest of M.D. to grant permanent custody to Job and Family Services.

{¶18} R.C. 2151.414 (D) lists the factors a trial court should weigh in determining the best interest of the child. The factors are:

{¶19} “(1) The interaction and interrelationship of the child with the child's parents, siblings, relatives, foster caregivers and out-of-home providers, and any other person who may significantly affect the child;

{¶20} “(2) The wishes of the child, as expressed directly by the child or through the child's guardian ad litem, with due regard for the maturity of the child;

{¶21} “(3) The custodial history of the child, including whether the child has been in the temporary custody of one or more public children services agencies or private child placing agencies for twelve or more months of a consecutive twenty-two month period ending on or after March 18, 1999;

{¶22} “(4) The child's need for a legally secure permanent placement and whether that type of placement can be achieved without a grant of permanent custody to the agency;

{¶23} “(5) Whether any of the factors in divisions (E)(7) to (11) of this section apply in relation to the parents and child.”

{¶24} The factors in R.C. 2151.414 (E) are:

{¶25} ***

{¶26} “(13) The parent is repeatedly incarcerated, and the repeated incarceration prevents the parent from providing care for the child.

{¶27} ***

{¶28} “(16) Any other factor the court considers relevant.”

{¶29} The trial court stated it found by clear and convincing evidence, and after consideration of all the relevant factors set forth in R.C. 2151.414 (D) and (E), it was in M.D.'s best interest to terminate appellant's parental rights and grant permanent custody of the child to Job and Family Services.

{¶30} The trial court's finding of facts states the guardian ad litem provided a written report to the court, and believes it is in the child's best interest for the court to sustain the motion for permanent custody.

{¶31} The court found appellant has been incarcerated intermittently and ordered to three different community-based correctional facilities and several residential drug treatment facilities. In addition to convictions for drug offenses, appellant has multiple theft convictions and other offenses. Appellant has a history of successful rehabilitation consistently followed by relapse. Appellant was terminated from probation following a conviction for a drug offense. At the time of the hearing, appellant was enrolled in a treatment program. If she failed to complete the program she would face a probation violation hearing.

{¶32} The court found appellant had three children, a son who is deceased, M.R., who is in the legal custody of his paternal grandmother, and M.D. The court found appellant did not have a relationship with M.R.

{¶33} The trial court found the child's foster mother testified M.D. is a happy baby with some adjustment issues and digestive problems. She receives special exercises, formulas, and teething toys. M.D. sees an orthopedic physician for bowed legs. The foster mother is interested in adopting M.D.

{¶34} The trial court found on supervised visitations, the child had a difficult time engaging with appellant. The court concluded the child is doing well in the foster home and is extremely bonded with the foster father. The foster family is learning sign language to help deal with the child's speech delays.

{¶35} We find the record contains sufficient, competent and credible evidence to a clear and convincing degree that it is in the best interest of M.D. to grant permanent custody to Job and Family Services.

{¶36} The second assignment of error is overruled.

{¶37} For the foregoing reasons, the judgment of the Court of Common Pleas, Juvenile Division, of Delaware County, Ohio, is affirmed.

By Gwin, P.J.,
Hoffman, J., and
Wise, J., concur

HON. W. SCOTT GWIN

HON. WILLIAM B. HOFFMAN

HON. JOHN W. WISE

IN THE COURT OF APPEALS FOR DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

IN THE MATTER OF: M.D.

:
:
:
:
:
:
:
:
:
:
:
:
:
:

JUDGMENT ENTRY

CASE NO. 10-CAF-02-0015

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas, Juvenile Division, of Delaware County, Ohio, is affirmed. Costs to appellant.

HON. W. SCOTT GWIN

HON. WILLIAM B. HOFFMAN

HON. JOHN W. WISE